No. 89-167

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In The

Supreme Court of the United States

October Term, 1989

INSURANCE CORPORATION OF AMERICA,

Petitioner,

v.

J.S. DARST, INSURANCE COMMISSIONER, STATE OF WEST VIRGINIA; STATE OF FLORIDA, TOM GALLAGHER, COMMISSIONER, DEPARTMENT OF INSURANCE AND TREASURER; STATE OF CONNECTICUT AND PETER F. KELLY, INSURANCE COMMISSIONER; ROBERT D. HAASE, COMMISSIONER OF INSURANCE, STATE OF WISCONSIN; AND WILLIAM D. HAGER, COMMISSIONER OF INSURANCE, STATE OF IOWA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Whether, in a hearing to determine the authenticity and genuineness of purported ancient court orders, the proponent's mere offer into evidence of copies of said orders certified by a clerk of a court other than the court which issued the orders, which were suspicious on their face, shifts the burden of proof of authenticity to the opponent of such issue.

2. Whether there is any substantial federal question presented by the manner in which the case was handled below relating to burden of proof, given the finding of fact of the District Court that the orders were not authentic.

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STATEMENT OF THE CASE

Although the petitioner presents a lengthy Statement of the Case, the Court should be apprised of the following pertinent facts which do not appear in the petition.

This litigation resulted as a response to four independent state proceedings initiated by the insurance departments of the respondents against the petitioner. Each respondent sought to enforce its respective Unauthorized Insurers Act. The state actions claimed the petitioner was transacting the business of insurance without a license in the respective states. This fact is undisputed by petitioner. The petitioner defended by claiming it had the right to sell insurance without a license in all fifty states by virtue of a purported 1914 court order from the United States Circuit Court of Delaware sitting at Dover, Delaware.

Although purportedly issued by the Circuit Court of Delaware, the petitioner offered at trial copies of the orders certified by deputy clerks of the District Court for the District of Columbia. The orders bear neither a District of Columbia file stamp nor a District of Columbia docket number.

The 1914 order and a purported related 1911 order from the same court contained numerous facial anomalies. The anomalies which were not refuted at trial include:

1. Both orders are entered by the "United States Circuit Court of Delaware at Dover, Delaware." The circuit courts were abolished effective January 1, 1912. Act of March 3, 1911, ch. 13, 36 Stat. 1087 (Judicial Code of 1911). The practice in cases carried over from the circuit

court was to refer to the "district court" in the caption. App. at 250.[1] The Circuit Court of Delaware had not had its seat of business at Dover, Delaware since 1856. Act of June 14, 1856, ch. 45, 11 Stat. 22.

2. The orders are issued outside the court's jurisdiction, i.e., Beckley, West Virginia, P. App. at C-3;[2] the latter location never was within the boundaries of the Circuit or District Court of Delaware. Except for certain Interstate Commerce Commission cases, a federal court in one jurisdiction could not sit in another jurisdiction and lawfully issue orders. *See* 1 Moore, *Federal Practice* ¶ 0.3(2), at 23 n. 15 (2d ed. 1986).

3. The orders purport to bind persons – the Commissioners – who were not listed in the caption of the 1914 order and over whom there would have been no personal jurisdiction. The federal courts in 1914 had no power to issue process outside their own jurisdiction. *Id.*

4. The orders exhibit a conformed signature of a "substitute judge." The evidence indicated there is no federal office known as "substitute judge." App. at 183, 252; Defendants' Exhs. 7, 13, 14. Other circumstances, such as lack of an equity number, rules of court, and the ramifications of the orders, suggest a "master in chancery" would not have been involved. App. at 431-33.

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[1] References to the Appendix filed in the Court of Appeals for the Third Circuit are designated as "App. ___."

[2] The Appendix to the petition is designated "P. App. at ___."

5. The orders bear no docket number and are handwritten. Dr. Robert Plowman, Chief Archivist of the Philadelphia branch of the National Archives and respondents' witness, testified there was a consecutive numbering system for equity cases for the period in question in Delaware and there was a case file for each docket number, thus refuting the possibility of unaccountable destruction of the Delaware court's records. App. at 253.

6. The orders have a far-reaching effect contrary to all contemporary or future law and policy. At the time the orders would have been entered, the authority of the states to regulate insurance was well established. *See Paul v. Virginia*, 75 U.S. 168 (1869). It was later reaffirmed by Congress in the McCarran Act, 15 U.S.C. § 1012.

Other than the proffered certified copies, there is no affirmative evidence of the orders. A thorough search of the court documents for the District and Circuit Courts of Delaware, which were in the possession of the National Archives branch in Philadelphia, utterly failed to locate them. App. at 245-246.

The Chief Clerk of the United States District Court for the District of Columbia concluded the certification of the copy of the 1914 order by his deputy was a mistake in view of the fact that, after checking, it was determined that the original was not in his office's possession and the document had no file-stamp or case number. App. at 667, 705. At most, the Clerk testified, a copy that was an exhibit in another case was certified. App. at 703.

The orders were purportedly signed by Ben Green. Respondents presented ample evidence from records custodians at the Justice Department and the National

Archives in Washington that there is no record of a Ben Green as an appointed judge prior to 1960 or as a commissioned officer of the United States. App. at 286. No evidence to the contrary was ever offered.

The petitioner misstates that the magistrate "refused during trial to admit the orders pursuant to Rule 902(4)." Pet. at 8. On the contrary, at the close of trial the orders were admitted and the magistrate stated:

> I think that because we have documents admitted for ID, aside from the primary documents at issue here, that I am going to change their technical status somewhat and admit them as Plaintiffs' 3 and 4 subject to the defendants' objections. I will resolve the authenticity and the admissibility after I have received your briefs.

App. at 324.

REASONS FOR DENIAL OF THE PETITION

1. The decision below does not conflict with any other federal or state court decision on the issue of the authenticity of the purported court orders involved in this litigation. In fact, there is consistency between the Third Circuit's decision and that of the Court of Appeals for the Ninth Circuit in *Insurance Corporation of America v. Hulett*, No. 87-6565, slip op. (Ninth Circuit, June 27, 1988). *See* R. App. at A-1.[3] The Ninth Circuit ruled that the identical documents "on their face are not authentic." R. App. at A-2. In an order dealing with the issue of

[3] The Appendix to this brief is referred to as "R. App. ___."

sanctioning ICA's counsel, on the Ninth Circuit's own motion, that court further stated "there are serious reasons to doubt [their] authenticity," R. App. at A-11, and, cited in detail several "badges of apparent falsification" on the face of the orders. R. App. at A-11 to A-12. Therefore, the granting of the petition would be unnecessary since any review of the Third Circuit's affirmance of the District Court's evidentiary rulings would not disturb the Ninth Circuit's independent decision on the merits, finding the alleged orders were not authentic.

2. The issue presented by this case is not of the calibre, importance and scope that warrants this Court's review. The issue of the authenticity of these two purported court orders is esoteric, based on its own peculiar facts, and of limited, if any, precedential value in that only the litigants would be interested in whether the orders are genuine. This point is demonstrated by the fact that neither the district court nor court of appeals decisions have been published.

3. The trial court was faced with the single factual issue of determining whether particular purported orders from a now defunct federal court were genuine and authentic. The threshold requisite to establish the existence of a court document through introduction of a certified copy thereof is that the original is genuine and was duly executed. *Winn v. Patterson*, 34 U.S. (9 Pet.) 663, 673 (1835). The District Court could properly have refused to admit the orders under Fed. R. Evid. 902, because the prerequisites for admissibility thereunder had not been met. While the threshold for admission under Rule 902 is not high, it is nevertheless not totally nonexistent. 5 *Weinstein's Evidence* ¶ 902(4)[01] (1983); *see*

also In re Japanese Electronic Products, 723 F.2d 238, 285 (3d Cir. 1983), *rev'd on other grounds*, 106 S.Ct. 1348 (1986). Implied in Rule 902 is the common law requirement that a proper certification be made. *See Mullican v. United States*, 252 F.2d 398, 402 (5th Cir. 1958). Such a certification would be one from the court which would have had possession of the original document – the United States District Court for the District of Delaware, or from its repository for historical documents, the appropriate branch of the National Archives. *Id.* It was settled early that the custodian of a document can only certify to copies required by law to be recorded or kept by him, or where some statute expressly made such copies evidence. *See e.g., New York Dry Dock v. Hicks*, 18 F. Cas. 151 (C.C.D. Mich. 1850). Absent the certification from the Delaware court or Philadelphia branch of the National Archives, there was never any foundation for admitting the orders.

The relevance of "admission" of the orders is, in any event, overstated by petitioner. The trial court did ultimately admit the orders. P. App. at B-18; and had admitted them for "identification" purposes during the trial. App. at 126. At the close of the trial the orders were admitted as full exhibits. App. at 324. Thus, there was no prejudice to petitioner from an evidentiary standpoint. The orders were "in" the record. Once that was accomplished, however, their authenticity was in issue. Petitioner would have admission of the orders determine the merits of the controversy but this clearly places the cart before the horse. As stated by Judge Weinstein:

> The central point is that whenever proffered evidence is challenged on grounds of authenticity or identity, it should be admitted once a

> prima facie case has been made on the issue. Such a finding of authenticity does not guarantee that the evidence will be considered by the trier of fact. *While it permits admission of the evidence it is . . . subject to the jury's ultimate determination as to its genuineness. The opposing party may introduce evidence disputing genuineness and argue the point to the jury. Once the evidence is admitted the question becomes one of credibility and probative force* and the trier may ultimately disbelieve the proponent's proof and entirely disregard or substantially discount the persuasive impact of the evidence admitted. The rule requires only that the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.

5 *Weinstein's Evidence* ¶ 901(a)[01] (1988) (emphasis added) (footnotes omitted).

The District Court correctly found that admission of the orders under Fed. R. Evid. 902 would not serve to shift the burden to respondents.

> Rule 902 deals only with admissibility. It provides for admission of certain documents. *Once admitted, the proponent on an issue has the normal burden of proof, unaided by a presumption*. Should authenticity become an issue, the court may explain the background of reliability. . . .

5 *Weinstein's Evidence* ¶ 902[01] at 902-8 (1983) (emphasis added).

The petitioner confuses the rules of evidence, which require some basic threshold of authenticity to justify admissibility of documentary evidence, and the proponent's burden of proving the genuineness of a document when it is duly put at issue in a case. A major defect in

petitioner's case is demonstrated on page 16 of the petition where it presents the propositions that "extrinsic evidence of authenticity is not a condition precedent to the admissibility of certified copies of public records" and that "this Court has recognized that a document offered by a public officer whose duty it is to keep the originals should be received in evidence." Petitioner then goes on to assert that the "Third Circuit's affirmance of the decision of the Magistrate is inherently inconsistent with these authorities." Although the above quoted propositions are sound, they are not at issue or applicable in this case. The fact is that the magistrate did admit the contested orders into evidence in this case so the first quoted proposition is not at issue. App. at 324; P. App. at B-14 to B-15. Moreover, the second quoted proposition is totally inappropriate because the fact is that the certified copies relied on do not come from "a public officer whose duty it is to keep the originals." Petitioner offered no evidence whatsoever that the District Court for the District of Columbia is the proper repository for original documents originating from the "United States Circuit Court of Delaware at Dover, Delaware." Respondents' witness, on the other hand, testified that the Philadelphia branch of the National Archives holds all Delaware court files for the period in question. App. at 233.

As the facts were found by the magistrate, the orders possessed many suspicious and unusual characteristics; the validity of the certification process was questionable. Under these circumstances it would have been a travesty of justice to place the burden of proof on the merits of the authenticity issue on respondents. The Court should

leave the fact findings of the magistrate, as affirmed by the Third Circuit, undisturbed.

4. At the scheduling conference, both parties were admonished by the presiding district court judge to treat the burden of persuasion on the issue of authenticity as though it were on them. App. at 40. At trial on the authenticity issue, petitioner proceeded first, i.e., it had the burden of going forward, which normally implies the burden of proof. Thus, it had every reason to believe the burden of proof was on it. This was especially so in light of the inherently questionable and unusual nature of the orders.

The trial court's ultimate finding that petitioner failed to meet its burden of proof was not a retroactive assignment of the burden of proof but simply a statement that petitioner had failed to prevail on the merits and that the orders were in fact not authentic. Petitioner was hardly prejudiced by having to put its evidence on in its case-in-chief instead of in its rebuttal case. The timing of the receipt of evidence did not, in other words, create error of constitutional dimension. The order in which petitioner introduced its "extrinsic" evidence into the record was ultimately irrelevant.

Nor was there any property right in the orders to which due process could attach. Property rights are a creation of state law. *See Bishop v. Wood*, 426 U.S. 341, 345 (1976). The orders, purportedly issued by a *federal* court, cannot purport to create an entitlement under *state* law to an exemption from *state* insurance law.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

Respondents

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INSURANCE CORPORATION OF AMERICA, Plaintiff-Appellant, vs. STANLEY HULETT, President, California Public Utilities Commission, et al., Defendants-Appellees.	No. 87-6565 DC# CV-87-2515-JSL Central California ORDER (Filed June 27, 1988)

Appeal from United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Submitted: May 27, 1988
Motions Panel

Before: HUG, BRUNETTI and NOONAN, Circuit Judges

Insurance Corporation of America ("ICA") appeals an order by the United States District Court for the Central District of California denying ICA's request for a temporary restraining order and preliminary injunction against defendants suspending the operating authority of certain limousine operators. These operators are threatened with suspension because they are insured by ICA which has failed to comply with the state regulation of insurance companies. ICA alleges that the district court's

denial of its motion does not give full faith and credit to two court orders, dated 1911 and 1914 respectively, which precluded state regulation of ICA.

The bases of ICA's suit are two decrees attached to its complaint. The first is dated December 8, 1911 and is headed, "In the United States Circuit Court of Delaware at Dover, Delaware." It is signed by "Ben Green, Substitute Judge." The second decree, dated February 26, 1914, is similarly captioned and similarly signed. These decrees purport to establish that certain insurance companies are free from any state or federal regulations.

The decrees on their face are not authentic. There was no such court as the "United States Circuit Court of Delaware." There was no such office as "Substitute Judge." There was not, in the period 1911-1914, any federal judge known as "Ben Green." See *Judges of the United States* (2 ed.).

Even it the orders were authentic, they would not preclude regulation today by the State of California. The McCarran-Ferguson Act enacted in 1944 provided that:

> The business of insurance and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business. 15 U.S.C.A. § 1012(a).

If ICA was "grandfathered" under legislation in effect in 1914, it was not so exempt under this Act of 1944. The orders refer to ICA as a "grandfathered" corporation without citing any authority for this status. That a court in 1914 might have determined that an insurance company was "grandfathered" under statutes in effect at the

time, has no bearing on whether the company is subject to regulation under statutes in effect today. ICA has offered no proof that the modern statutory scheme exempts it from regulation.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INSURANCE CORPORATION OF AMERICA, Plaintiff-Appellant, vs. STANLEY HULETT, President, California Public Utilities Commission, et al., Defendants-Appellees.	No. 87-6565 DC# CV-87-2515-JLS Central California ORDER (Filed Oct. 18, 1988)
In re: ALLAN J. BESBRIS and JANET L. RUBIN, Respondents.	

Before: HUG, BRUNETTI and NOONAN, Circuit Judges

Appellant's petition for rehearing is hereby DENIED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INSURANCE CORPORATION OF AMERICA, Plaintiff-Appellant, vs. STANLEY HULETT, President, California Public Utilities Commission, et al., Defendants-Appellees.	No. 87-6565 DC# CV-87-2515-JLS Central California ORDER (Filed Oct. 18, 1988)
In re: ALLAN J. BESBRIS and JANET L. RUBIN, Respondents.	

Appeal from United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Submitted: May 27, 1988

Before: HUG, BRUNETTI and NOONAN, Circuit Judges

Insurance Corporation of America (ICA) brought suit seeking to bar the California Department of Insurance (the Department) from regulating ICA or suspending the operating authority of its policy holders. ICA based its request on two decrees purportedly issued by a federal

court. These decrees excited the suspicion of the Department and their authenticity was contested in the district court. Without making a finding on their authenticity the district court gave judgment for the Department. On appeal this court affirmed and issued a show cause order to the attorneys for ICA, Allan J. Besbris and Janet L. Rubin, requiring that they show cause why they had reason to believe that the two decrees were authentic and, failing to do so, why the attorneys should not be subject to discipline by this court.

The first of these decrees was in a case entitled *Pocahontas Insurance and Trust Company, Plaintiff v. Pocahontas Insurance Company, Defendant; Pocahontas Insurance Company, Plaintiff v. Insurance Corporation of America and First Corporation Insurance Group.* The order is designated as "Final Order of Clarification." It is dated December 8, 1911. It purports to issue from United State Circuit Court of Delaware at Dover, Delaware. At the conclusion of the decree there appears:

(s) Ben Green
Substitute Judge

The decree finds that there are four separate corporations – the ones mentioned in the caption of the case – and that they have 71 separate divisions as shown on exhibits that are not attached to the decree. The court further finds that each of these 71 divisions "can operate in all the states, territories and the District of Columbia under the original Charter" and that each of them has been "authorized and approved to do business" in these jurisdictions; further that the parent company may sell

each of these divisions and each may become "a separate and independent corporation in each state."

The decree carries the further notation that it was recorded "on January 8, 1912 at Charleston, West Virginia at the office of the Ex-Officio Insurance Commissioner of the State of West Virginia." A seal of the United States District court for the District of Columbia is stamped on the final page of the decree and with the seal is a certification:

A TRUE COPY
JAMES E. DAVEY, CLERK

By K.M. Keyes
Deputy Clerk

The second decree has a different caption. It purports to be the case of *Pocahontas Insurance and Trust Co., & Pocahontas Insurance Co., & Insurance Corporation of America, & Firstcorp Insurance Group v. J.D. Darst, Insurance Commissioner State of West Virginia, et al.* It is entitled "Final Order." It is dated February 5, 1914. The first page announces that the decree is in the United States Circuit Court of Delaware at Dover, Delaware. The final page reads as follows:

> Entered this 5th day of February, 1914 at
> Beckley, West Virginia by the Panel
>
> /s/ Ben Green
> Substitute Judge

Like the 1911 decree it purports to be admitted to record in the Ex Officio Insurance Commissioner's Office of West Virginia and it is certified in the same way by the United States District Court Clerk for the District of

Columbia. The court seal is not visible on this copy. The additional information is supplied that copies were "written and mailed to all state and [sic] etc. this day."

The decree refers to "a Final Order of Clarification" "entered on December 8, 1911 by this court" in which there are "findings which are still in effect, and which shall remain in effect so long as these corporations and their divisions shall desire to operate in all States and Territories of the District of Columbia." The decree continues:

> And now, the matter dealing with the "Insurance Commissioners" and the right to regulate these four Plaintiffs and each one's seventy-one divisions and the eight other corporations. The court finds that the Four Plaintiffs and their seventy-one divisions and the eight other corporations are "Grandfathered" Insurance Corporations and are not in any way subject to regulation by any Insurance Department, Commissioner, or any other official of any State, Territory or by the District of Columbia.
>
> This Final Order shall apply to all insurance Departments in all States and Territories and the District of Columbia Defendants to this case. Service of process has been acknowledged by either the Governor of each State, Territory and the District of Columbia, or its agent, and the same is of record in this case.
>
> Therefore, it is Ordered that the four Plaintiffs and each one's seventy-one divisions shall be free from any regulations by any Local, State (Insurance Departments and/or Commissioner or the State Administrator's Office) or by the Federal regulations what-so-ever. Further, the

> deposits shall not be removed, but shall appreciate and Compound yearly to support each Plaintiff, the eight independent Insurance Corporations and the seventy-one divisions of each of the plaintiffs.

In response to the order to show cause, Besbris and Rubin have noted that the two decrees were certified by two deputy clerks of the United States District Court for the District of Columbia; that the chief clerk of this court and the two deputy clerks who had certified the orders believed that they were authentic; that the president and "the Forwarding Counsel" for ICA both confirmed that they believed the orders were authentic; and that counsel had consulted with Professor Erwin C. Surrency.

In an affidavit in this case Professor Surrency states that he is professor of law and director of the law library at the School of Law of the University of Georgia; that he had previously been on the law faculty of Temple University School of Law; that he has published a substantial number of articles relating to the history of the federal courts; and that he is the author of a book entitled *History of the Federal Courts* (1987). He further declares that based on his research he knows there was a United States Circuit Court for the District of Delaware in existence until January 1, 1912 and therefore "according to statutory provisions, continued to hear cases for some time concerning those cases entered on the docket of the circuit court." He further states that prior to the 1920s federal courts generally followed the customs of the state in which the court sat and it was not unusual for judges to hear cases at locations other than those designated by statute and that "it would not have been unusual for a 'Substitute Judge' to preside in the place and stead of an

Article III judge in a location not specifically provided for by any Judiciary Act." Professor Surrency further states that he has reviewed the two orders and based upon his knowledge acquired through 30 years of research it is his "opinion that these Orders which are the subject matter of the proceedings . . . are authentic."

ANALYSIS

Federal Rule of Civil Procedure 11 mandates disciplinary sanctions for misrepresentations by an attorney. The rule requires the attorney to certify that filed documents are well grounded in fact, to the "best of the signer's knowledge, information, and belief formed after reasonable inquiry." Fed. R. Civ. P. 11; *see In Re Boucher*, 837 F.2d 869, 871 (9th Cir. 1988). The test for determining whether an attorney has violated Rule 11 is whether the attorney has conducted a *"reasonable inquiry* into whether his paper is frivolous, legally unreasonable, or without factual foundation." *Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 557 (9th Cir. 1986) (emphasis in original). If Besbris and Rubin have misrepresented the authenticity of the decrees to the court, they are subject to discipline if they failed to conduct a reasonable inquiry on the subject.

The relevance as well as the authenticity of the first decree is doubtful. This court is at a loss to understand how a case that in 1911 was a case between various divisions of the Pocahontas Insurance and Trust Co. became in the second decree a case in which the original plaintiffs and defendants are all aligned as plaintiffs against the Insurance Commissioner of West Virginia "et

al." On the face of it there is no coherence between the two decrees.

As to the second decree – the only decree of relevance – there are serious reasons to doubt its authenticity:

1. It purports to bind the insurance departments of all states, territories and the District of Columbia. The decree recites that process has been acknowledged by the governor "of each State, Territory and the District of Columbia, or its agent." But the federal courts in 1914 had no power to issue process outside their own jurisdictions without specific congressional authorization. 1 J. Moore, Moore's Federal Practice ¶0.3[2] at 23 & n.15 (citing *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 329 (1838) ("[B]y the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts [and] independently of positive legislation, the process can only be served upon persons within the same district.")) The recital of service of process in the decree is, therefore, a badge of apparent falsification.

2. The decree purports to be issued "at Beckley, West Virginia by the Panel." Even making allowance for the adoption of state customs as stated by Professor Surrency, there is no evidence whatsoever that a federal court in one jurisdiction would sit in another jurisdiction and issue orders. *See* 1 J. Moore, *supra; Toland*, 37 U.S. at 328 ("[T]he circuit court of each district sits in and for that district; and is bounded by its local limits.") On its face the statement that the decree was issued at Beckley, West Virginia contradicts the statement that it was issued

in the United States Circuit Court of Delaware. The contradiction is a badge of apparent falsification.

3. The decree explicitly and extravagantly finds that the insurance companies in question "are 'Grandfathered' Insurance Corporations and are not in any way subject to regulation" by a state. The use of the word "grandfather" as a verb, or an adjective derived from a verb, is an anachronism. Lexicographers place the first such use of the word "grandfather" no earlier than 1968. C. Barnhart, S. Steinmetz & R. Barnhart, The Second Barnhart Dictionary of New English 224 (1980). A Lexis search of "older federal cases," including Supreme Court cases 1790-1924, appellate court cases 1938-1969, and district court cases 1948-1969, does not disclose a single use of the word "grandfathered." The use of "grandfathered" is a badge of apparent falsification.

4. The defendants have offered evidence to this court that no public record exists of these decrees or the cases in which they were purportedly entered.

Out of an abundance of caution we wish to give Besbris and Rubin the opportunity to be heard in person and to show that, despite the strong indicia of fabrication, they had reason to submit the decrees as relevant and genuine. The court therefore remands this case to the district court for an evidentiary hearing. The district court should determine whether or not the decrees are authentic, and whether the inquiry conducted by ICA's attorneys satisfied the requirements of Rule 11. In particular, the district court should examine the date and circumstances of Besbris and Rubin's consultation with Professor Surrency. The defendants should be invited to

participate in the hearing and to present any further evidence they may have to offer on the authenticity of the decrees and the inquiries made by Besbris and Rubin. After the district court has held the evidentiary hearing and entered its findings into the record, this court will rule on the order to show cause issued to ICA's attorneys.

IT IS SO ORDERED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INSURANCE CORPORATION OF AMERICA, Plaintiff-Appellant, vs. STANLEY HULETT, President, California Public Utilities Commission, et al., Defendants-Appellees.	No. 87-6565 DC# CV-87-2515-JLS Central California ORDER (Filed Dec. 1, 1988)
In re: ALLAN J. BESBRIS and JANET L. RUBIN, Respondents.	

Before: HUG, BRUNETTI, and NOONAN, Circuit Judges.

On October 18, 1988, the petition for rehearing was denied. That is the final action of this court on the merits of the appeal. The appellant's time for filing a petition for a writ of certiorari runs from that date.

The order pertaining to factual findings concerning possible Rule 11 sanctions has no bearing on the finality of the order on the merits of the appeal. The motion for clarification is denied.